Supreme Court, U. S.
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No. 77-132

In the Supreme Court
of the United States

OCTOBER TERM, 1977

No. 77-132

SHARON HILL,

Appellant,

v.

DAVID MAX GARNER,

Appellee.

Circuit Court No. 6960
SC No. P-2459

On Appeal from the Supreme Court of the State of Oregon

MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE TO AFFIRM JUDGMENT

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No. 77-132

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-132

SHARON HILL,

Appellant,

v.

DAVID MAX GARNER,

Appellee.

On Appeal from the Supreme Court of Oregon

MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE TO AFFIRM JUDGMENT

David Max Garner, Appellee and Defendant below, moves the Court to dismiss the appeal of Sharon Hill upon the grounds that (1) the federal question sought to be reviewed was not properly raised below and (2) the state court did not expressly pass upon the federal question. In the alternative, Appellee moves the Court to affirm the judgment upon the ground that the federal question has recently been decided by this Court and needs no further argument.

THE RECORD BELOW

Sharon Hill (hereafter Plaintiff) brought action against David Max Garner (hereafter Defendant) in the Circuit Court of the State of Oregon for the County of Hood River on September 23, 1973. The

complaint (Appendix A) alleged that plaintiff was a passenger in an automobile operated by defendant and that she was injured due to defendant's negligence. (The complaint also named Frank M. Jennings as a defendant but he was later removed from the case.) The original complaint sought recovery on a theory of negligence, rather than gross negligence as required by Oregon Revised Statutes § 30.115.[1] Defendant, who was in military service at the time, did not immediately respond to the complaint. Jennings, however, filed a demurrer (Appendix B) on the ground that the complaint did not state facts sufficient to constitute a cause of action under Oregon law. Rather than oppose this demurrer, plaintiff conceded it and the court entered an order sustaining the demurrer (Appendix C). An amended complaint, and later a second amended complaint (Appendix D), alleged gross negligence and to this pleading defendant filed his answer (Appendix E) in the nature of a general denial.

It is this sequence of events that plaintiff claims "indirectly" raised the federal question in controversy here. The trial court, however, was never called upon to decide if Oregon's Guest Passenger Statute was valid either under the Oregon or United States Constitution. Indeed, during the three days of trial, plaintiff did not even mention the statute's unconstitutionality and even after the jury was instructed in the law, plaintiff took only this exception:

---

[1] Orgon Revised Statutes will be hereafter referred to as O.R.S.

> "Secondly, I would except to that part of the defendant's requested instruction No. 5 which was given by the court and that portion of that Instruction which reads: 'for an act to be grossly negligent, it must constitute conduct showing a conscious indifference to the rights of the plaintiff, and a conscious willingness to expose her to great hazard.' I object on the grounds that it is not the law, that the law is simply a willful, wanton disregard of the rights of others, regardless of whether the person be the plaintiff or others happen to be injured." (Tr. 289)

The exception goes only to the wording the court used in its definition of gross negligence. No challenge was made to the statute itself.

As this Court has often stated:

> "The jurisdiction of this court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right." *Oxley Stave Company* v. *Butler County*, 166 U.S. 648, 655, 17 S. Ct. 709 (1897)

When plaintiff appealed the case to the Oregon Supreme Court, she assigned only one error. This read as follows:

> "ASSIGNMENT OF ERROR
>
> The Court erred in sustaining the motion for judgment notwithstanding the verdict:
>
> '* * * Your Honor, at this time, the defendant moves for a judgment N.O.V., notwithstanding

> the verdict on the grounds and for the reason that the evidence was insufficient to submit the question of gross negligence to the jury and that the verdict is contrary to the evidence and not in accord with the instruction' (Tr. 290)". (Appellant's Brief, p. 8)

And as plaintiff stated in the opening to her brief to the Oregon Supreme Court:

> "The sole question on appeal is whether there was sufficient evidence to enable the jury to find the defendant grossly negligent." (Appellant's Brief, p. 1)

It is true that at the end of the brief, plaintiff devoted two pages to the question of the constitutionality of O.R.S. 30.115, suggesting that the Oregon Supreme Court "might again look at the issue" (Appellant's Brief, p. 17). It was not clear, however, whether she felt the statute violated the Oregon Constitution or the United States Constitution or both.[2] For that reason, defendant maintains that the federal question was not properly raised. *New York, ex rel Bryant* v. *Zimmerman*, 278 U.S. 63, 67-68, 49 S. Ct. 61 (1928).

Furthermore, plaintiff violated Rule 7.19 of the Rules of Procedure of the Supreme Court and Court of Appeals of the State of Oregon, which requires that: "Each assignment of error shall be clearly and succintly stated under a separate and appropriate heading." The Rule also goes on to state: "In the court's discretion, alleged errors of the trial court will not be considered on appeal unless regularly assigned as error in the appellant's or cross-appellant's opening brief, except that the appellate court may take notice of errors of law apparent on the face of the record." Because plaintiff failed to list the constitutional question among the assignments of error, defendant did not respond to this issue in his brief before the Oregon court, and from the tenor of the opinion rendered below, it is apparent that the Oregon Supreme Court also did not choose to consider the constitution question. Under the circumstances, this Court should hold that plaintiff waived the federal issue. *Beck* v. *Washington*, 369 U.S. 541, 553, 82 S. Ct. 955 (1962).

[2] The complete text of Plaintiff's brief, insofar as it relates to the constitutionality of O.R.S. 30.115, is set forth in Appendix F.

After plaintiff lost her appeal below, she petitioned the Oregon Supreme Court for a rehearing. In this petition, she made no mention at all of the constitutionality of O.R.S. 30.115. Indeed, it was not until her Jurisdictional Statement was filed before this Court that the question was first properly raised. Plaintiff is late with her protest and for that reason the appeal should be dismissed.

THE FEDERAL QUESTION IS NOT SUBSTANTIAL

The Oregon Guest Passenger Statute is almost identical to a Connecticut statute upheld by this Court in *Silver* v. *Silver*, 280 U.S. 117, 50 S. Ct. 57 (1929). The one significant difference between the two stat-

utes is that rather than applying only to automobiles, O.R.S. 30.115 affects guest passengers in every type of conveyance.

Similar challenges to guest passenger statutes have been dismissed recently by this Court. *White* v. *Hughes*, 519 S.W.2d 70 (ARK. 1975), appeal dismissed for want of substantial federal question, 423 U.S. 805, 96 S. Ct. 15 (1975); *Cannon* v. *Oviatt*, 520 P.2d 883 (Utah 1974), appeal dismissed for want of substantial federal question, 419 U.S. 810, 95 S. Ct. 24 (1974), *reh. denied*, 419 U.S. 1060, 95 S. Ct. 645 (1974). Plaintiff's Jurisdictional Statement presents nothing not encompassed within these two previous cases. Since the Court has already decided in favor of the constitutionality of such statutes, the judgment below should be affirmed.

CONCLUSION

Plaintiff did not raise the federal question at the trial level, nor did she properly raise it on appeal before the Oregon Supreme Court. She should not, therefore, be heard now to complain after so long a silence. The appeal should be dismissed, or in the alternative, the judgment below should be affirmed.

Respectfully submitted,

VERGEER, ROEHR & SWEEK
By Duane Vergeer
Thomas Sauberli
Of Attorneys for Appellee

APPENDIX A

IN THE CIRCUIT COURT OF THE
STATE OF OREGON

FOR THE COUNTY OF HOOD RIVER

SHARON HILL, Plaintiff,	)	Case No. 6960
v.	)	
	)	COMPLAINT
FRANK W. JENNINGS and DAVID MAX GARNER, Defendants.	)	(Action at Law)

COMES NOW the plaintiff for her complaint against the defendants, alleges and declares as follows:

I.

At all times hereinafter mentioned, Defendant Jennings was the owner of a 1962 Chevrolet Impala Supersport automobile and said vehicle was maintained for the benefit and use of the members of his household and that said vehicle was at all times material hereto a vehicle used as a family purpose automobile. That Defendant Garner was a member of Defendant's, Jennings, household.

II.

That on or about January 5, 1972, the plaintiff was riding as a passenger in said vehicle above-de-

scribed traveling in a generally northerly direction on Highway 281, when about 1.2 miles north of the intersection of Highway 281 and Lost Lake Road, the defendant, David Max Garner, who was driving the above-described vehicle in a northerly direction, caused or permitted his vehicle to cross over the center of the highway and collide with a vehicle operated by Blanchard Baldwin.

III.

That the defendants were negligent in one or more of the following particulars:

1. In failing to keep a proper lookout.

2. In operating the vehicle at an excessive rate of speed under the circumstances then and there existing.

3. In failing to keep their vehicle under proper control.

4. In failing to drive their vehicle on the right-hand half of the highway.

5. In failing to drive as close as practicable to the right edge of the highway.

6. In failing to maintain their vehicle in a safe and proper operating condition.

That the act of negligence above set forth, either standing alone or one in combination with the other, were done or conducted in such a manner as to constitute gross negligence.

7. In knowingly operating their vehicle in an unsafe mechanical condition in disregard for the safety of others.

That the above acts of negligence are the proximate cause of the injuries, both temporary and permanent, to the plaintiff as set forth below.

The plaintiff has suffered the following injuries:

1. Tearing of the skin and flesh, puncturing of the head cavity, including but not limited to the eyes.

2. Tearing of the skin about the body causing permanent and irreparable scarring.

3. Temporary total loss of vision.

4. Permanent partial loss of vision.

5. Other internal injuries.

All said injuries arising as a direct and proximate cause of the defendants' sole and gross negligence.

V.

That the plaintiff's reasonable medical, hospital, doctor, operative, and other medically related expenses as of the date of filing of the Complaint total approximately $5,000.00. It is anticipated that the plaintiff's future medical expenses will total approximately $4,000.00.

VI.

That as of the date of filing the Complaint the plaintiff has suffered loss of wages in the approximate amount of $3,000.00.

VII.

That as a result of the pain and suffering caused by the injury, the past and future embarrassment and anxiety caused by the permanent scarring, the plain-

tiff's loss of vision and anxiety over the continued loss of vision, blurred vision, and double vision; all of which continues up until the time of filing this Complaint, and are anticipated to continue permanently thereafter, and as a result of the other attendant problems creating a limitation upon the plaintiff's ability to fully enjoy life's pleasures, the plaintiff has been damaged in the sum of $175,000.00.

WHEREFORE, plaintiff prays for judgment against the defendants in the amount of $175,000.00, plus costs and disbursements incurred herein.

1. General damages $175,000.00.
2. Special damages of $3,000.00 lost wages; $5,000.00 related medical expenses prior to trial, and $4,000.00 anticipated medical expenses yet to be incurred.
3. Costs and disbursements.

SANDERS, LIVELY & WISWALL

By /s/ *John Svoboda*
JOHN SVOBODA
Of Attorneys for Plaintiff

APPENDIX B

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF HOOD RIVER

SHARON HILL, Plaintiff,	)	
v.	)	No. 6960
FRANK W. JENNINGS and DAVID MAX GARNER, Defendants.	)	DEMURRER

Comes now the defendant Frank W. Jennings, and demurs to plaintiff's Complaint on the ground and for the reason that the same fails to state a cause of suit or action upon which relief may be granted in this Court.

VERGEER, SAMUELS, ROEHR & SWEEK

By /s/ *Duane Vergeer*
Of Attorneys for Defendant
Frank W. Jennings

APPENDIX C

IN THE CIRCUIT COURT OF THE
STATE OF OREGON

FOR THE COUNTY OF HOOD RIVER

SHARON HILL, Plaintiff,	)	
v.	)	No. 6960
FRANK W. JENNINGS and DAVID MAX GARNER, Defendants.	)	ORDER

This matter coming on before the Court upon defendant Frank W. Jennings' Demurrer to plaintiff's Complaint herein, and it appearing that plaintiff concedes the position taken by this defendant in connection therewith, now therefore,

IT IS HEREBY ORDERED AND ADJUDGED that the defendant's Demurrer be and hereby is allowed, and that plaintiff have 10 days from the date hereof to further plead herein.

DATED this 4th day of April, 1974.

/s/ *John A. Jelderks*
Judge

APPENDIX D

IN THE CIRCUIT COURT OF THE
STATE OF OREGON

FOR THE COUNTY OF HOOD RIVER

SHARON HILL, Plaintiff,	)	No. 6960
v.	)	SECOND AMENDED
DAVID MAX GARNER, Defendant.	)	COMPLAINT (Personal Injury - Action at Law)

COMES NOW the plaintiff for her complaint against the defendant, alleges and declares as follows:

I.

That on or about January 5, 1972, the plaintiff was riding as a passenger in a 1962 Chevrolet Impala Supersport automobile traveling in a generally northerly direction on Highway 281, when about 1.2 miles north of the intersection of Highway 281 and Lost Lake Road, the Defendant, DAVID MAX GARNER, who was driving the above-described vehicle in a northerly direction, caused or permitted his vehicle to cross over the center of the highway and collide with a vehicle operated by Blanchard Baldwin.

II.

That the defendant was grossly negligent in one or a combination thereof of the following particulars:

1. In failing to keep a proper lookout.

2. In operating the vehicle at an excessive rate of speed under the circumstances then and there existing.

3. In failing to keep his vehicle under proper control.

4. In failing to drive his vehicle on the right hand half of the highway.

5. In failing to drive as close as practicable to the right hand edge of the highway.

6. In failing to maintain his vehicle in a safe and proper operating condition.

7. In knowingly operating his vehicle in said unsafe mechanical condition in disregard for the safety of others.

III.

That the above acts of gross negligence or combinations thereof are the direct and proximate cause of the injuries, both temporary and permanent, to the plaintiff as set forth below:

1. Tearing of the skin and flesh, puncturing of the head cavity, including, but not limited to, the eyes.

2. Tearing of the skin about the body causing permanent and irreparable scarring.

3. Temporary total loss of vision.

4. Permanent partial loss of vision.

5. Other internal injuries, including injuries to the leg, leg bone, knee, hip, but not limited thereto.

All said injuries arising as a direct and proximate cause of the defendant's sole and gross negligence.

IV.

That the plaintiff's reasonable medical, hospital, doctor, operative, and other medically related expenses as of the date of filing the Complaint total $5,000.00.

V.

That as of the date of filing the Complaint, the plaintiff has suffered loss of wages of $3,000.00.

VI.

That as a result of the pain and suffering caused by the injury, the past and future embarrassment and anxiety caused by the permanent scarring, the plaintiff's loss of vision and anxiety over the continued permanent or partial loss of vision, the blurred vision, and the double vision, all of which continue from the date of injury to the time of filing this Complaint and are anticipated to continue permanently thereafter, and as a result of the plaintiff's inability to engage in those activities which she would otherwise have been able to engage in, or is now relegated to engage in them in a limited capacity of confined capacity, the plaintiff has been damaged in the sum of $180,000.00.

WHEREFORE, Plaintiff prays for judgment against the defendant as follows:

1. General damages $180,000.00.

2. Special damages of $3,000.00 lost wages, and $5,000.00 related medical expenses.

3. Costs and disbursements incurred plus interest at the rate of six percent (6%) per annum from the date of judgment until paid.

SANDERS, LIVELY & WISWALL

By /s/ *John Svoboda*
JOHN SVOBODA
Of Attorneys for Plaintiff

APPENDIX E

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF HOOD RIVER

SHARON HILL, Plaintiff,	)	No. 6960
v.	)	ANSWER TO AMENDED COMPLAINT
DAVID MAX GARNER, Defendant.	)	

COMES NOW the defendant David Max Garner, and for Answer to plaintiff's Amended Complaint admits, denies and alleges as follows:

I.

The defendant admits that an accident occurred involving Sharon Hill and this answering defendant when an automobile driven by this answering defendant became involved in a collision at or about the place mentioned in plaintiff's Amended Complaint, and except as so admitted, the defendant denies each and every allegation in plaintiff's Amended Complaint set forth.

WHEREFORE, having fully answered plaintiff's Amended Complaint this answering defendant prays that the same be dismissed and that plaintiff take nothing thereby.

VERGEER, SAMUELS, ROEHR & SWEEK
By /s/ *Duane Vergeer*
DUANE VERGEER
Of Attorneys for Def. Garner

APPENDIX F

Excerpt from Appellant's Brief, pp. 15-17:

The preceding portion of the argument is confined to the facts of this case as they apply to the Guest Passenger Laws of Oregon. Oregon is now just one of nineteen states which have a Guest Passenger statute; of the thirty-two states which at one time or another embraced the Guest Passenger concept, thirteen have abolished it. Considering the fact that eighteen states never adopted the concept and thirteen others have discarded it as being unrealistic, irrational and unconstitutional, it would appear that stare decises is no longer a controlling principle. What can be said of a concept that denies a passenger from compensation for the same conduct upon which a pedestrian or occupants of another car could recover in this day and age when virtually every driver is insured and the financial burden is spread throughout the population by liability insurance premiums? To promote hospitality? It, like other human traits, cannot be effectively promoted by legislation.

The two most recent states to find it unconstitutional are Ohio and Nevada. In the Ohio case, *Primes* v. *Tyler*, 43 Ohio St. (2d) 195, — N.E. — (1975), the Court unanimously held that the concept did not have a substantial and rational relationship to the primary purposes of (1) protecting the hospitality of the host-driver and (2) preventing collusive actions; therefore, the equal protection clauses of the Federal

and State Constitution were violated. That Court further noted that the real party in interest was the defendant's liability insurance carrier and such a claim could not be considered an act of "ingratitude" toward the host. As to "collusive lawsuits", the Court acknowkledged that the host and passenger could simply lie about the existance (sic) of compensation.

The Nevada case, *Laakonen* v. *The Eighth Judicial District Court of the State of Nevada*, — P.2d —, (NEVADA, No. 7654, July 31, 1975) a Mandamus Proceeding, relied heavily upon the unanimous California case of *Brown* v. *Merlo*, 506 P.2d 212 (Cal. 1973). The Nevada Court took four steps in arriving at its opinion:

1) Equal protection guarantees demand that a class of people not be singled out for discriminatory treatment unless the discrimination is rationally related to a statutes (sic) purpose.

2) The Guest Passenger concept has two purposes:
   a) To promote hospitality, and
   b) To prevent collusive claims.

3) To promote the two purposes, the host is immune from ordinary negligence actions by a class of gratuitous auto guests in contrast to paying guests.

4) Such immunity does not promote hospitality or prevent collusive claims.

Your appellant respectfully suggests that the Court might again look at the issue of the constitutionality of the Oregon Guest Passenger Statute. A candid glance discloses a large class of people required to suffer without a remedy in order that an illusive theory might survive.